SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

ALFRED TESTA AND PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONERS

vs.

HARRY KATT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS FOR PROVIDENCE AND BRISTOL COUNTIES

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(Judge's and clerk's certificates omitted in printing.)

3 In District Court of the Sixth Judicial District

Summons and sheriff's return

The State of Rhode Island and Providence Plantations

To the Sheriff of the County of Providence, his Deputies, or to either of the Town Sergeants or Constables in the County of Providence, greeting:

We command you to summon Harry Katt, alias John Doe, d/b/a Harry's, of Providence, in said county, if to be found in your precinct, to answer the complaint of Alfred Testa, of Providence, in said county, at a District Court of the Sixth Judicial District, to be holden at the Sixth Judicial District Court House, in Providence, in said county, within and for said District, on the 7th day of September A. D. 1944, at nine of the clock in the forenoon, in an action of the case; as by declaration to be filed will fully set forth, to the damage of the plaintiff (as he says) nine hundred dollars.

Hereof fail not, and make true return of this Writ with your doings thereon.

Witness, the Seal of the District Court of the Sixth Judicial District, at Providence, this 26th day of August in the year A. D. one thousand nine hundred and forty-four.

A true copy, Attest: MATTHEW M. MCCORMICK, *Clerk.*
JOHN P. COONEY, Jr.

PROVIDENCE, *sc.*

In Providence, in said County, on this 31st day of August A. D. 1944, I have this day summoned the within named defendant as commanded, by leaving an attested copy of the within writ at the last and usual place of abode of the said defendant with some person living there within my precinct.

JOHN DALEY, *Deputy Sheriff.*

Service	$0.75
Copy	.50
Travel	.20
	$1.45

A true copy Attest:

4 Received Aug. 29, 1944. Sheriff Office. No. 109024. 245913. Writ of Summons. Alfred Testa vs. Harry Katt. Arthur Votolato, Plff. Atty. Goldberg & Goldberg, Deft. Atty. 9-11-44. Entry Fee, $1.00. On Entry-day, during session In-

answered. Continued to Sept. 14, 1944, Sept. 21, 1944, Sept. 28, 1944, Oct. 2, 1944, Oct. 5, 1944. Oct. 5, 1944, after having demurrer overruled defendant allowed 2 weeks to plead over. John P. Cooney, Jr. Nov. 14, 1944. By agreement decision for the plaintiff for $680.00 and costs. John P. Cooney, Jr., Associate Justice. Providence, sc., Clerk's Office, District Court of the Sixth Judicial District, November 15, A. D. 1944. I hereby certify that enclosed are all the papers in the within case; that a jury trial is claimed by the defendant on the entry-day of said writ within two days after the decision in said cause. Costs paid, $10.00. John P. Cooney, Jr., Clerk. Superior Court Filed Nov. 21, 1944. Matthew M. McCormick, Clerk.

5 In District Court of Sixth Judicial District

ALFRED TESTA

v.

HARRY KATT

Declaration

Alfred Testa, of the City and County of Providence, State of Rhode Island, complains of Harry Katt, also of said City, County, and State, duly summoned by the Sheriff in an action of the case.

1. For that whereas the defendant heretofore to wit: on the 3rd day of August A. D. 1944, sold the plaintiff one 1939 La Salle club coupe automobile for the sum of One Thousand One Hundred ($1,100.00) Dollars equipped with a radio and heater.

2. That at the time of said sale the said defendant was not a dealer as defined in Document No. 34246 issued by the Office of Price Administration July 10, 1944.

3. That the maximum price allowed under said regulations for a 1939 La Salle club coupe is Eight Hundred Fifty ($850.00) Dollars and Forty ($40.00) Dollars for the radio and heater, making a maximum total of Eight Hundred Ninety ($890.00) Dollars.

4. That the defendant by reason of said sale to the said plaintiff made an overcharge of Two Hundred Ten ($210.00) Dollars.

5. That said overcharge by the defendant was a willful and direct violation of the maximum price for a used passenger automobile as defined in said regulation.

6 6. Wherefore an action has accrued to the plaintiff to have a recover of and from the defendant treble damages plus a reasonable attorney's fee and costs as made and provided for by the Emergency Price Control Act, of 1942, as amended.

7. Yet, though often requested, the said defendant has not paid to the plaintiff that sum of money or any part thereof, but refuses so to do, to the damage of the plaintiff.

Wherefore the plaintiff sues in the sum of Nine Hundred ($900.00) Dollars as laid in this writ dated the 26th day of August A. D. 1944.

By his Attorney,

Arthur N. Votolato.
ARTHUR N. VOTOLATO.

7 In District Court of the Sixth Judicial District

[Title omitted.]

Defendant's demurrer to plaintiff's declaration

Now comes the defendant in the above-entitled cause and demurs to the plaintiff's declaration, and for grounds of demurrer says:

First. That said declaration fails to show any cause of action accruing to said plaintiff under the common law.

Second. That said declaration fails to show any cause of action accruing to said plaintiff under the Statutes of the State of Rhode Island.

Third. That said declaration fails to show any cause of action accruing to said plaintiff under Chapter 1150 of the Public Laws of Rhode Island, 1942, or any additions or amendments thereto (State Emergency Defence Act of 1942, so-called).

Fourth. That said declaration fails to show any cause of action accruing to said plaintiff under any rule, order, regulation, or power vesting in or exercised by the Governor of the State of Rhode Island and Providence Plantations under the Public Laws of Rhode Island, 1942, Chapter 1150, or any additions or amendments thereto (State Emergency Defence Act of 1942, so-called).

Fifth. That the Court of the State of Rhode Island have no jurisdiction of the subject matter in that said declaration alleges a cause of action accruing to the plaintiff arising out of
8 an alleged violation of the Emergency Price Control Act of 1942 of the United States and thereby is an alleged violation of a law of the United States and not of the State of Rhode Island.

Sixth. That the Courts of the State of Rhode Island have no jurisdiction of the subject matter in that said declaration alleges a cause of action accruing to the plaintiff arising out of an alleged violation of a Maximum Price Regulation established by the Office of Price Administration of the United States of America under

the Emergency Price Control Act of 1942, and thereby is an alleged violation of a regulation of an administrative office created under the laws of the United States and not of the State of Rhode Island.

Seventh. That the Courts of the State of Rhode Island have no jurisdiction of the subject matter in that said declaration alleges a cause of action accruing to the plaintiff arising out of an alleged violation of Document Number 35246 issued by the Office of Price Administration on July 10, 1944, and thereby is an alleged violation of a law of the United States and not of the State of Rhode Island.

Eighth. That the Courts of the State of Rhode Island have no jurisdiction of the subject matter in that said declaration alleges a cause of action accruing to the plaintiff arising out of an alleged violation of Document Number 34246 issued by the Office of Price Administration on July 10, 1944, and thereby is an alleged violation of a regulation of an administrative office created under the laws of the United States and not of the State of Rhode Island.

Ninth. That said declaration allegedly granting the plaintiff a cause of action arising out of an alleged violation of a Statute of another jurisdiction by the defendant is penal in
9 nature and not remedial in nature based on the law of compensatory damages.

Tenth. That the allegations set forth by the plaintiff in said declaration manifest that the plaintiff is pari delicto with the said defendant in the alleged violation.

HARRY KATT,
By his Attorneys.

10 In Superior Court for County of Providence

No. 109024

ALFRED TESTA

vs.

HARRY KATT, APPT.

Reporter's transcript

Before His Honor, Mr. Justice SULLIVAN and a jury May 31,

Appearances: For the Plaintiff: Arthur N. Votolato, Esq. For the Defendant: Philip B. Goldberg, Esq.

12 May 31, 1945. Jury is impaneled and sworn and case is opened to the jury by Mr. Votolato.

HARRY KATT (Sworn)

By Mr. VOTOLATO:

1. Q. What is your name?
A. Harry Katt.
2. Q. Where do you live?
A. At 13 Balcom Street, Providence.
3. Q. You are the defendant in this case?
A. Yes, sir.
4. Q. What business were you in on August 3, 1944?
A. Automobile business.
5. Q. You had a used-car lot?
A. That's right.
6. Q. Do you know Alfred Testa, the plaintiff in this case?
A. I do.
7. Q. Did you have any business dealings with him?
A. I did.
8. Q. On August 3, 1944, did you have any dealings?
A. I did.
9. Q. Tell the court and jury what the transaction was.
A. Mr. Testa, whom I have known for a long time, came to my lot and asked me to sell him an automobile. I wasn't there
13 myself, but my man was. My man told him he would see me, because he knew me, which he did. This was August first according to my records. He came back and he saw me and he had a 1939 Chrysler car, a car that we would call all worn out. I showed him a car, a 1939 La Salle sedan club coupe which I had just got through overhauling at a great expense to me, so that the car would come up to the expectations of the OPA and everybody concerned, and I have the bills and checks to show. I made a trade to Mr. Testa from his car to mine and he took the car and went away. I charged him the ceiling price for this La Salle, which was $1,100 at that time. About two weeks later Mr. Testa returned.
10. Q. This is August third?
A. Yes.
11. Q. He had a Chrysler?
A. Yes.
12. Q. You took it in trade?
A. Yes.
13. Q. How much did you allow him for the trade for his car?
A. Offhand I haven't that paper here. I have it at the office.
14. Q. Isn't it a fact that he sold you the Chrysler first and then you sold him the La Salle?
A. Naturally, that is the way you take a car, the way
14 you trade.

15. Q. You bought his car and then you sold this on a full bill of sale?

A. Yes.

16. Q. Now, you did take his car, of course?

A. Of course.

17. Q. I show you this paper. What is that?

A. This is the bill of sale for payment in full for the La Salle that I have signed and gave to Mr. Testa.

18. Q. You gave Mr. Testa this bill of sale for the 1939 La Salle for $1,100, received payment in full by cash?

A. That's right.

19. Q. As far as the transaction on the 1939 club coupe La Salle goes, you sold it to him for $1,100 cash?

A. That's right.

(Bill of sale marked "Plaintiff's Exhibit 1.")

20. Q. On August 3, 1944, Mr. Katt, had you qualified with the OPA as a licensed dealer?

A. Yes.

21. Q. Have you your license with you?

A. There isn't a license that the OPA gives you. They only gave us permission to sell with a warranty, as long as you had a State license, which is the same regulations as the OPA came out with. I already had that.

22. Q. That was a license that had been in effect before the OPA regulations went into effect?

A. Yes, sir.

23. Q. On August third had you been licensed by the OPA to charge the ceiling price as defined by the new regulations?

A. There is no license. It is just permission. We have an O. K. and any dealer that had this State license was O. K.'d by the OPA to sell with a warranty.

24. Q. Isn't it a fact, Mr. Katt, that before you could qualify for the OPA license you must be the holder of a State license?

A. Yes.

25. Q. But the fact that you had a State license does not give you the right to operate under the OPA regulations, does it?

A. I had permission.

Mr. GOLDBERG. It has been answered, may it please the court. I believe the witness said that anyone licensed under the State license was given permission.

The COURT. This question may be answered. Your exception is noted. Defendant's exception noted.

26. Q. The fact that you had a State license does not give you the right to operate under the OPA regulations, does it?

A. It did.

27. Q. Are you familiar with the OPA regulations?

A. No; I am not.

28. Q. This answer to the previous question is your opinion without knowing the OPA regulations; is that correct?

A. No; that isn't like I said that. I have a license and then I had permission to sell.

29. Q. I asked you originally if you had a license; not a permission.

A. There is no license.

30. Q. Are you sure about that?

A. Yes.

31. Q. Have you inquired of the OPA whether or not there is a license issued and a number given to each dealer?

A. Yes, sir.

32. Q. What did you find out?

A. There is no license.

33. Q. Are you sure of that?

A. Positive.

34. Q. You had no license from the OPA on August 3, 1944?

A. There is no license.

35. Q. I have asked you if you had a license from the OPA on August 3, 1944. Will you answer yes or no?

A. No; I had none.

36. Q. You said that you sold the car for $1,100, which was the ceiling price?

A. Yes.

37. Q. How do you know what the ceiling price was?

A. Well, we have the regulations set down by the OPA. I have a book in my pocket.

38. Q. I show you a pamphlet. Do you know what it is?

A. Yes; I know what it is.

39. Q. This fixes the price of automobiles, document No. 34246. Is that the one you have?

A. This is what I refer to, M. P. R. 540.

40. Q. This is document No. 34246.

A. Yes. It is the same thing I have.

41. Q. From this pamphlet you found out what the ceiling price of this car was?

A. That's right.

42. Q. And you say it was listed as $1,100?

A. That's right. Eleven hundred and something. I didn't charge him the full amount because he was a friend of mine.

43. Q. That $1,100 ceiling price quoted by you is the ceiling price for a car sold with a warranty?

A. Yes, sir.

44. Q. Now, this bill of sale that you gave Mr. Testa contains no warranty; is that right;

A. The warranty the OPA gives us is a different form; a separate form. It looks like a diploma. I gave that
18 to Mr. Testa.

45. Q. You issued in your own hand a warranty to Mr. Testa, warranting that car?

A. That's right, sir.

46. Q. Without being first licensed by the OPA?

A. There isn't such a thing.

47. Q. Where did you get the warranty from?

A. We got them from—We had to make them ourselves from a copy in M. P. R. 540.

48. Q. You issued a warranty to Mr. Testa?

A. Yes, sir.

49. Q. You are under oath now, Mr. Katt?

A. I know that.

50. Q. Isn't there a printed form that the OPA issues for a bill of sale also?

A. No.

51. Q. This is the bill of sale that you gave him?

A. Yes, sir.

52. Q. In addition you gave him a warranty?

A. Also a certificate of transfer and a gasoline surrender slip; three forms.

53. Q. Now, that car was brought back to you a couple of days after you delivered it to him?

A. I don't remember it it was a couple of days; a short while after.

54. Q. He complained about it?

A. Yes.

19 55. Q. He had plenty of complaints?

A. He complained about the battery and a few other things which I took care of.

56. Q. You detained the car for several weeks after that?

Mr. Goldberg. That is a separate transaction. I ask that be striken out. There was a charge of conversion.

Mr. Votolato. I withdraw the question, Your Honor.

57. Q. Have you a copy of the document you claim you delivered to Mr. Testa?

A. No, I haven't.

58. Q. The OPA regulations call for records that should be open for inspection at all times by the OPA. Have you the records in connection with this transaction?

A. The records that you refer to is the record of when I bought the car and from whom I bought it and to whom I sold it. I have that.

59. Q. Will you show me the record of this sale to Mr. Testa?
A. Yes, right here. I also have other papers I have to look up.
60. Q. Is there any notation that it was sold as a warranted car?
A. We hardly do that.
61. Q. You make the warranties in triplicate?
A. The warranties are not made in triplicate; in single
20 file.
62. Q. Mr. Katt, if you got the pads from the OPA you will find that they are made in triplicate, one copy for the OPA, one copy for themselves, and one copy for the purchaser of the car.
A. The OPA doesn't supply us with the warranty. The OPA only gives us a picture of it so that we could have it printed. It doesn't say on this one that we have to keep a copy.
63. Q. Have you any one of your warranties with you?
A. No, I haven't.
64. Q. I will show you from the regulations the dealer's warranty. Are you familiar with that?
A. The same thing. It says that was delivered and warranted to the customer, which I did.
65. Q. You have no copies of this warranty?
A. No.
66. Q. No notation of the sale?
A. This one? just a card and the index.
67. Q. This is a record of the sale?
A. I have a bill of sale also and it is in my ledger, that I sold the man a car and how much I sold it. This is a car that I sold; the date sold and bought.
68. Q. Have you any record to indicate this sale was made as a warranted sale?
A. No.
69. Q. You are familiar with the printed warranty in the regulations?
21 A. Yes.
70. Q. Were you familiar with the regulations on August 3, 1944?
A. I had to be.
71. Q. Now, Mr. Katt, in order to qualify as a dealer under the OPA regulations you would have to have in addition to a lot, a repair shop or station to repair these cars so that you would come under the degree or definition of a dealer?
A. That's right.
72. Q. Did you have such a repair shop?
A. I did, for the past eight years.
73. Q. Where was it?
A. Anthony Cerrone.
74. Q. That was not yours, was it?

A. I had a contract. That was O. K. That was all was needed to sell with a warranty.

75. Q. What address?

A. That was 977 North Main Street, Providence, Rhode Island.

76. Q. The definition I will read to you.

Mr. GOLDBERG. Does my brother intend to introduce that in evidence?

Mr. VOTOLATO. Yes; I will offer it for identification.

Mr. GOLDBERG. I object, may it please the court; that is a rule and regulation of a jurisdiction—a United States jurisdic-
22 tion. The law of the United States must be proven as a fact in the State court. If we tried to bring in a law or rule or regulation of a sister State we would have to introduce that as a distinct fact. In this case a law of the United States or any rule or regulation of a bureau must be introduced as a distinct fact.

Mr. VOTOLATO. I think the court could take judicial notice of the pamphlet. The State courts have always taken judicial notice of printed papers, almanacs, and documents of that sort. He claims he has a copy and he is familiar with it. He claims to have transacted this sale under these regulations. I think there is enough evidence to identify this document as an authentic government document.

Mr. GOLDBERG. This is a regulation that has the efficacy of the law of a superior jurisdiction. I maintain that a rule or regulation of a bureau of the United States must be proven as a fact and the court should not take judicial notice thereof.

The COURT. Isn't it customary that the courts of Rhode Island do take judicial notice of the law of Massachusetts or the
23 law of Connecticut or the law of New York? If that is so, doesn't this rule have the full force and effect as a law? Isn't this the law of the Federal government as to the OPA? It seems to me the Legislature has taken notice of it.

Mr. GOLDBERG. I am not acquainted with the law, Your Honor.

Mr. VOTOLATO. I think Mr. Goldberg is making a mountain out of a molehill. We are here to try this case on the facts.

Recess.

Mr. VOTOLATO. I will introduce this document, Your Honor.

The COURT. Very well. OPA regulations marked "Plaintiff's Exhibit 2."

77. Q. Are you licensed now, Mr. Katt, with the OPA?

A. There is no such thing as a license. I have permission from the OPA.

78. Q. I will show you that Section 14 of this pamphlet, Plaintiff's Exhibit 2.

A. This one here?

79. Q. Yes, that one.

24 A. "Licensing. The provisions of Licensing Order No. 1 licensing all persons who make sales under price control, are applicable to all sellers subject to this regulation. A seller's license may be suspended for violations of the license or of one or more applicable price schedules or regulations. A person whose license is suspended may not, during the period of suspension, make any sale for which his license has been suspended."

80. Q. Do you still say there is no license?

A. That's right.

81. Q. You still say that you were a dealer as provided for by these regulations?

A. Yes, sir.

82. Q. And that you had authority to sell according to the ceiling prices set out in this pamphlet?

A. Yes, sir.

83. Q. Now, when did you get these warranties that you claim you gave to Mr. Testa?

A. Some printing concern in Philadelphia.

84. Q. When?

A. July tenth.

85. Q. You have none with you?

A. No.

86. Q. Who filled out the one that you gave Mr. Testa?

A. I did.

87. Q. Will you show us from the ceiling price of the La
25 Salle cars which car you sold to Mr. Testa and how much the ceiling price was?

A. Coupe 2 and 4.

88. Q. What page?

A. No page number and no section.

89. Q. Each car has a separate section?

A. Yes, sir. It is Section 13, coupe 2 and 4, $850.

90. Q. That is the price that you could charge if you were not an authorized dealer under the OPA and if you sold without a warranty?

A. That is the price you could charge—I can buy it for $850.

91. Q. That is the price that you can sell for without a warranty?

A. I didn't sell that way.

92. Q. Were you selling with a warranty on August 3, 1944?

A. Positively. Every car I had was reconditioned and sold with a warranty.

93. Q. The most you could sell for without a warranty was $850?

A. That is what I can pay for it.

94. Q. What could you sell it for without a warranty on August 3, 1944?

A. About $890.

95. Q. What would have to be on it to sell it for that?

A. Well, $850, and you can charge $40 for a radio and
26 heater. The OPA says we can't sell it for over $850 if you don't sell it with a warranty.

96. Q. In this particular transaction if you were not an authorized dealer with a license from the OPA, that means you could sell it for $850?

A. I don't know that. I only sell with warranties.

97. Q. I am asking you now, Mr. Katt, you are familiar with these regulations?

A. Yes, sir.

98. Q. Without a warranty the most you could charge for that car was $850?

A. I can buy it for that.

Mr. GOLDBERG. He said that he sold it with a warranty.

The COURT. The court seems to understand that is the rule and regulation, that if he bought the car he could not buy it for less than $850, and if he sold it without a warranty it would be $850. If it had a radio and a heater it would be $40 more.

WITNESS. That's right.

The COURT. Why go over it again? I gather that from the witness' testimony. He could not buy it for less than $850, and if he did not sell it with a warranty he could not sell it for more than $850 unless it had a radio and a heater.

99. Q. Will you read the definition of a dealer?

27 A. "'Dealer' means a person engaged, in whole or in part, in the business of buying, selling, repairing, and reconditioning used cars and who maintains a place of business for the display, sale, repairing, and reconditioning of such cars. A person who cannot qualify as a dealer because he does not maintain a place of repairing and reconditioning may be approved in writing as a dealer under this regulation by the Office of Price Administration regional office for the region in which his place of business is located, or a district office in that region authorized by such regional office, if he provides adequate evidence to that office that he has established and is in a financial position to maintain, a working arrangement with a reputable business engaged in the repairing and reconditioning of used cars."

100. Q. Did you submit any proof to the OPA that you qualified as a dealer under this regulation?

A. Yes, I did.

101. Q. Did you get in writing from the OPA this permission that you claim you had?

A. Yes, I did.

102. Q. Have you that permission with you?

A. I have it. I left it there.

103. Q. This is dated September fifteenth?

28 A. Yes, sir.

104. Q. On August 3, 1944, had you this written permission from the Office of Price Administration?

A. No, I didn't.

105. Q. You got permission on September 15, 1944?

A. That's right.

29 Cross-examination by Mr. GOLDBERG:

106. Q. How long have you been in business, Mr. Katt?

A. Nine years.

107. Q. Where was your place in those nine years?

A. On Huntington Avenue, and then on Broad Street.

108. Q. Did you qualify under the State rules and regulations as far as dealers are concerned?

A. Yes, sir; at all times.

109. Q. As a qualified dealer, do you know the qualifications under the State law?

Mr. VOTOLATO. We admit that he has a State license. We have no complaint about that, may it please the court.

Mr. GOLDBERG. Testimony will be brought in to show that through an interpretation the regulations were adopted and a permit was issued by the OPA or the man in charge, and those who qualified under the State law were automatically qualified under the OPA law.

Mr. VOTOLATO. I move that statement be stricken from the record. I don't think it is proper.

The COURT. This is cross-examination now. He testified
30 that because he had a State license he was informed by the officials of the OPA that he had a right to qualify. He had permission, not a license. It seems to the court it may be answered. Exception noted. Plaintiff's exception noted.

110. Q. Do you know the qualifications of a dealer under the State law?

A. I do.

111. Q. What are they?

A. That you must have a contract with a mechanic or a shop of your own. And before you could receive a State license you

must also show financial responsibility, and of course, you must qualify through the State House.

112. Q. Aren't you also obliged to satisfy them that you have a place of business?

A. Yes; you must have a place of business with buildings, fixtures, lights, and a lot, and show that statement from the bank.

113. Q. Now, on the date of this transaction between you and Mr. Testa, on or about the third of August, was your State license in full force and effect?

Mr. VOTOLATO. I object, Your Honor. We are not suing for any violation of any State law. It is a violation of the Federal law.

31 The COURT. You put the defendant on the stand, and this is cross-examination. He is saying that while he did not have a license from the OPA until September 1944, he had a State license and he complied with all the rules and regulations of the State law, and he was duly informed by somebody in authority that he had a right *do* do business in this manner. This is his defense. Whether or not it is a defense to the action or whether or not it meets the defense, you have a regulation which says certain things must be done.

Mr. VOTOLATO. I withdraw my objection.

The COURT. The only thing is this is the defendant. He could have called him back, and wouldn't this be proper in direct examination? He saw fit to cross-examine him. He could testify to this in direct examination, of course. The fact remains the rules of law are there, or the rules and regulations are there. Whether or not the office had the right to set them aside is another question. He did not have a permit or a license until September 1944. He is attempting to justify his acts.

Question No. 113 read by the stenographer as follows:

32 "Now, on the date of this transaction between you and Mr. Testa, on or about the third of August, was your State license in full force and effect?"

A. Yes, it was.

114. Q. Did you finally obtain a certificate from the Office of Price Administration?

A. I did when this trouble came up. I went up and he gave me one, a permission in writing.

115. Q. That is dated when?

A. September fifteenth.

116. Q. Now, did you give this man a warranty with the automobile that you sold him?

A. Positively, I did.

117. Q. Did you sell it above or below the ceiling price?

A. A few dollars before or below the ceiling price.

118. Q. What was the ceiling price with the warranty plus the radio and heater?

A. $1,113.

119. Q. You sold it for $1,100?

A. That's right.

120. Q. When this matter first arose or came to your attention or knowledge, from whom did it come, from the Office of Price Administration or some third person?

A. From the defendant.

121. Q. You mean the plaintiff?

33 A. Yes: the plaintiff.

Mr. VOTOLATO. I object. That is hearsay.

The COURT. Well, supposing the plaintiff said that he had a kick against him, is that permissible? The question is from whom did his first complaint come regarding this matter. As I understand it, it came from the plaintiff.

WITNESS. Mr. Testa.

122. Q. As a result of that did you go down to the Office of Price Administration?

A. I did, immediately.

123. Q. And has the Office of Price Administration taken any action against you?

A. No; they have not.

124. Q. Has the Office of Price Administration revoked or in any way withdrawn your license or permit?

A. No, sir.

125. Q. You are still operating under the Office of Price Administration license and permit?

A. That's right.

126. Q. Whom did you see at the Office of Price Administration?

A. Mr. Schwartz.

127. Q. Did you see any other person there?

A. No. That's all.

128. Q. Are you a member of the Used Car Dealers' Association?

A. I am.

34 Redirect examination by Mr. VOTOLATO:

129. Q. Mr. Katt, immediately after you had heard that Mr. Testa complained against you, you got out of the State of Rhode Island, did you not?

Mr. GOLDBERG. Wait a minute.

Mr. VOTOLATO. He can answer "yes" or "no."

Mr. GOLDBERG. I object to that.

Mr. VOTOLATO. You brought it out.

The COURT. What is the objection?

Mr. GOLDBERG. He was served here and he appeared before this court. When a man is out of the State on business or for any other matter, that has no relevancy whatsoever. I think that is——

The COURT. How about the rule under which you called this man? Doesn't that say something you are——

Mr. VOTOLATO. He is still your witness.

Mr. GOLDBERG. No; he isn't.

The COURT. No; he is still your witness. Under the rule you have a right to call a witness who has an adverse interest to that of the plaintiff, and examine him. You may call him as if in cross-examination. You are not bound by his answers.

35 You can impeach his testimony calling other witnesses. Having called him as your witness, his counsel may also use him in cross-examination. He is still your witness for cross-examination. What the court said previously was that if he wanted to, he could have withdrawn him and then recalled him later as his witness as if in direct examination, wherein he would only be permitted to examine him on direct questions and not in cross-examination. Under this rule there is something which says that you cannot in any way affect or pass upon the character of a witness that you call yourself. Whether is *is* concerning where he was, I don't know. You could not ask him if he had not been convicted of a crime. Put another question.

130. Q. You testified that the Office of Price Administration did not prosecute you?

A. That's right.

131. Q. When Mr. Testa made his complaint against you, Mr. Katt, you left the State of Rhode Island; isn't that right?

Mr. GOLDBERG. I object to that, may it please the court.

Mr. VOTOLATO. You brought it out. The reason they have not brought action is because he has been out of the State.

36 132. Q. Isn't that right?

The COURT. Wait a moment. Let the court rule. The question is did he not leave the State after Mr. Testa consulted him.

Mr. GOLDBERG. It isn't a question of bad character, but he is trying to imply the implication of leaving the State for some ulterior reason. There might be a criminal action and he left the State.

The COURT. Hasn't our Supreme Court decided that if a person is charged with running away, that may be considered in considering the probabilities of one's guilt or innocence?

Mr. GOLDBERG. In a criminal case. This is a civil matter.

Mr. VOTOLATO. I am not attacking his character. You brought out that the Office of Price Administration did not prosecute him.

The COURT. I think it may be answered. Exception noted. Defendant's exception noted.

133. Q. When Mr. Testa made his complaint against you, you left the State of Rhode Island; isn't that right?

A. Yes, sir.

87 134. Q. You sold your business also right after he made the complaint?

A. I did.

Re-cross-examination by Mr. GOLDBERG:

135. Q. This complaint was brought, Mr. Katt, some time prior to August 26, 1944?

A. That's right.

136. Q. Before you received the writ?

A. Yes.

137. Q. When did you leave the State?

A. Well, it is late in August.

138. Q. Where did you go?

Mr. VOTOLATO. I object; immaterial.

The COURT. I think it is immaterial, but he may answer it.

A. California.

139. Q. Were you in business there?

Mr. VOTOLATO. I object. No way to contradict it.

140. Q. You came back for trial, didn't you?

A. That's right.

88 MAX SCHWARTZ (Sworn)

By Mr. VOTOLATO:

1. Q. Your full name is what?

A. Max Schwartz.

2. Q. Where are you employed?

A. The OPA.

3. Q. What do you do there?

A. I am in the price division. We are charged with machinery regulations, giving information to the public and answering questions; trade information; registering and handling the automobile dealers who come under the automobile authorizations.

4. Q. Is the issuing of licenses to automobile dealers in your province?

A. Yes. It isn't a license. It is an authorization to sell at warranted prices.

5. Q. The regulations call them a license. Is there any other name you call it besides that?

A. No. That is something else. Under the Emergency Price Control Act it provides that a person doing business of any kind, selling anything, is issued a license automatically to do business, and that license can be only revoked by judicial proceedings. What we issue is an authorization to sell an automobile above the price, the ceiling price in here. An additional 25% can
39 be added on under certain conditions by the dealer.

6. Q. When you say authorization, do you mean to imply that he is authorized and licensed under the regulations?

A. No.

7. Q. Do you know what a dealer is?

A. Yes; I do.

8. Q. What is it?

A. The definition of a dealer is "A person engaged, in whole or in part, in the business of buying, selling, repairing, and reconditioning used cars and who maintains a place of business for the display, sale, repairing, and reconditioning of such cars. A person who cannot qualify as a dealer because he does not maintain a place for repairing and reconditioning may be approved in writing as a dealer under this regulation by the Office of Price Administration regional office for the region in which his place of business is located, or a district office in that region authorized by such regional office if he provides adequate evidence to that office that he has established, and is in a financial position to maintain, a working arrangement with a reputable business engaged in the repairing and reconditioning of used cars." We issue an authorization.

40 9. Q. Is that in writing?

A. Yes; it is.

10. Q. Calling your attention to August 3, 1944, did you know Harry Katt?

A. I knew of him. I don't remember whether I knew him personally or not.

11. Q. From the records of the office do you know whether or not Harry Katt had a written authorization from your office to charge ceiling prices, according to the OPA regulations?

A. No; he did not.

12. Q. What was the maximum price that an individual or a corporation could sell a 1939 club sedan for without this license or this authorization, such as a La Salle sedan or, rather, a 1939 La Salle club coupe?

A. The base price is $850. You can add $10 for a heater and $30 for a radio.

13. Q. That is $890 maximum?

A. Yes, sir.

14. Q. Without a written authorization from your office; is that right?

A. That's right.

15. Q. If Mr. Katt or any other individual had this written authorization, he would have a right to tack on the 25% and go up to $1,115?

A. I don't know. I haven't figured it up. They can
41 add 25% provided they are reconditioned and a written warranty issued.

16. Q. Does your office supply the written warranties?

A. We do not.

17. Q. You have a copy of the warranty that is required?

A. That's right.

18. Q. Section 7 is the form to be used of a warranty in dealing with a case such as this?

A. That's true.

19. Q. Now, did you investigate this case after a complaint was made to your office?

A. We did not.

20. Q. Are you familiar with this case at all?

A. Very, very slightly.

42 Cross-examination by Mr. GOLDBERG:

21. Q. When were these authorizations first issued by your department?

A. I can't tell you when the first one was issued. The regulation was issued on June tenth. That was June 10, 1944, effective July 10, 1944. It was given wide publicity when it was issued. I believe we immediately began to get inquiries from various dealers. I don't remember when the first one filed an application.

22. Q. You have records showing when the first one was filed, have you?

A. If I had gone through the records I could probably pick out the first one. I haven't got the records with me.

23. Q. Did you have a conference, you and Mr. Arris and Mr. Motta and Frank Crook, the president of the New Car Dealers' Association, and with Mr. Baker and Mr. De Cesare as representatives of the Used Car Dealers' Association?

Mr. VOTOLATO. I object, Your Honor. If the plaintiff was not present I think the question is objectionable.

43 The COURT. It can be answered yes or no, can't it? Did you have a conference?

A. Yes.

24. Q. And at that time were there inquiries as to the time of qualification and the form for qualifications?

Mr. VOTOLATO. I object to anything that took place, may it please the court.

Mr. GOLDBERG. If there is a violation of the rules and regulations, the men who put those rules and regulations in force know as to when the qualifications were to take place, and also as to the obtaining of the forms.

The COURT. This witness testified that on June 10, 1944, he gave publication, or his department gave publication that these rules and regulations would become effective on July 10, 1944. He stated that a number of inquiries came in. What more do you expect to show by this? That is July 10, 1944. Would he have the power to set aside any of these regulations?

Mr. GOLDBERG. Your Honor, he has told about the publication of these regulations. Now, if certain authorized representatives of a certain group conferred with these officials and they
44 were told certain things, and that is all we want to show— that these men already qualified from the fact they had qualified previously with the State House, and there was a blanket inclusion of the qualifications of those people who had qualified at the State House.

The COURT. These rules and regulations were promulgated by the department in Washington, not in Rhode Island. This witness testified that he gave publicity one way or another to these regulations, which included the selling price, or the ceiling price rather, of the automobiles, and what it was necessary to do to become a dealer, and so forth, having to establish a place of business, a building, lights, a lighted building, and a repair place, and that he gave notice of those regulations, and they would become effective on July tenth. Supposing he said, "All right, these do not apply to you." Have they any right or authority to set aside the regulations of the government?

Mr. GOLDBERG, I am not asking this man——

The COURT. You are asking about having a conference with reference to these regulations, and did you say that if you
45 have a State license you don't have to have another license.

Mr. GOLDBERG. I didn't ask that, may it please the court.

The COURT. No; you didn't. It may be answered. Exception is noted. Plaintiff's exception noted.

A. I don't remember whether any particular inquiries were made as to the time and form. We did discuss the general procedure and requirements.

25. Q. Did you have any forms at your office at that time for qualifications?

A. I don't remember whether we did or not? The regulation doesn't require any form. Just for the convenience of the dealers our office did prepare a form on which the application could be submitted. As a matter of fact, in the beginning most of the dealers submitted the application on their own letterheads.

26. Q. Did you advise the dealers' representatives at that time that those who had qualified under the State law would have a blanket qualification under the Federal law?

Mr. VOTOLATO. I object, may it please the court.

The COURT. It may be answered. Exception noted. Plaintiff's exception noted.

46 A. We did not.

27. Q. Do you know of your own knowledge whether the Dealers' Association headed by Frank Crook sent out notices to that effect?

A. I do not.

Mr. VOTOLATO. That doesn't matter, Your Honor.

The COURT. No. We have the regulations here. Unless you can point out some place where the State department or the division in Rhode Island has a right to set aside these regulations, despite anything to the contrary that was said, these regulations govern, don't they?

28. Q. Did you keep a stenographic report of what occurred there at the confepence?

A. No, I did not.

29. Q. Do you know if any stenographic report of the conference was made?

A. No stenographic report was made.

Redirect examination by Mr. VOTOLATO:

30. Q. You were summoned here? You did not come here willingly?

A. No. I received a subpoena.

47 ALFRED E. MOTTA (Sworn)

By Mr. VOTOLATO:

1. Q. What is your full name?

A. Alfred E. Motta.

2. Q. Where are you employed?

A. At the OPA.

3. Q. What office do you hold there?

A. I am chief of the industrial section.

4. Q. Among your duties do you have charge of passing upon licenses to used car dealers?

A. Yes, sir.

5. Q. I notice that a letter here addressed to Harry's, 532 Broad Street, Providence, Rhode Island, who is the defendant in this case, that is dated September 15, 1944, and that is above your signature; is that right?

A. It is.

6. Q. It is addressed to Harry Katt?

A. Yes, sir; addressed to Harry's.

7. Q. Will you read that letter?

A. "September 15, 1944. Harry's, 532 Broad Street Providence, Rhode Island. Re: Dealer Application Under Maximum Price Regulation 540. Gentlemen: Your September 11, 1944, application for approval to operate as a dealer under Section 15 (b) of Maximum Price Regulation 540 has been received.

48 After due consideration and examination of the facts submitted therein, the following action has been taken by this office:

Your application is approved.

This approval is based on your status as of date of application and is subject to revocation.

We note that your repairman, Anthony Cerrone, has not filed his ceiling prices as required by Revised Maximum Price Regulation 165. Will you please see that he complies with this Regulation within a reasonable time. Failure of Mr. Cerrone to file his prices may result in the revocation of this approval.

Very truly yours, George H. Arris, State Price Executive. By Alfred E. Motta, Chief, Industrial Section."

8. Q. Now, Mr. Motta, was there any file on Harry's or Harry Katt in your office when this application was received?

A. I don't understand that question.

9. Q. Well, had you inquired as to whether or not he had violated any OPA ceiling price or regulation prior to the filing of this application?

Mr. Goldberg. I object, may it please Your Honor.

49 The Court. It may be answered. Your exception is noted. Defendant's exception noted.

A. I am not sure that I can recall that, because it is customary when we receive an application to check whether the requirements of the regulation have been met. I don't think that—One of the requirements is that past violations should be checked.

10. Q. That went into effect in July 1944?

A. That's right.

11. Q. The application was in the name of Harry's. Do you know who owns Harry's?

A. Well, I don't. The way it comes up to me is that the specialist, in this case Mr. Schwartz, investigates the application and submits to me a memorandum stating he has personally investigated the case, and I usually accept his recommendation. So that that is how it is.

12. Q. Had you discussed this particular application with Mr. Schwartz previous to that?

A. I don't remember. As to the regular procedure, we would probably discuss it. I have no recollection of it.

13. Q. In your handling of these cases do you issue a
50 license or authorization to a person who has been sued for a violation of the maximum price regulation, if you know it?

A. I don't know that we have been presented with that problem. Would we be apt to approve his application in that case?

14. Q. That is correct.

A. I don't know. I can't answer that. It would all depend upon the case. The hypothetical case is very vague.

15. Q. All you know the application in the name of Harry's was submitted and it was approved?

A. Yes.

16. Q. You know nothing about the past?

A. I personally do not.

17. Q. And as far as you know, the party this letter is addressed to was not authorized to charge the ceiling price as provided for by the maximum price regulation until September fifteenth?

A. That's right. The party was not authorized to charge the dealers' price or the warranted price previous to that date.

Letter marked "Plaintiff's Exhibit 3."

51 Cross-examination by Mr. GOLDBERG:

18. Q. Were you at that conference with Mr. Baker and Mr. Schwartz and Mr. Crook?

A. Yes.

19. Q. Was there any discussion as to the fact that a person having a qualified license from the State of Rhode Island had a blanket qualification under the OPA rules?

A. I might say on that conference I don't think there was any specific reference to that point, but it is our procedure at our office for the fellow or man or person or official in charge of the conference to make a report. I have such a report of this conference. If you would like to hear it I will read it to you.

20. Q. Yes.

A. This is a memorandum to Mr. Christopher Del Sesto, State Director, and Mr. George H. Arris, State Price Executive.

"Subject: Advisory Committee Meeting—Automobile Dealers.

A meeting of the Automobile Advisory Committee was held on August 2, 1944, at 10:00 A. M., Room 940. Present were Mr. Louis Baker, Mr. Richard Cesare, Mr. Francis Crook, Mr. Schwartz, and Mr. Motta. The meeting had been called by Mr. Motta for
52 the purpose of discussing the provisions of MPR #540. Mr. Motta called Mr. Crook by telephone and asked him to attend the meeting and to bring with him those members of the committee interested in the sale of used automobiles. The chief purpose of the meeting was to determine why applications for approval to sell as a 'dealer,' at warranted prices, were not coming in.

The provisions of Section 15 of MPR #540 were reviewed. The dealers were informed that the State OPA Office would work closely with the Rhode Island State Motor Vehicle Department. The provisions of the State Statute requiring dealers to obtain a State License were discussed in general. It was pointed out that since the State Statute required a showing that dealers be financially responsible and that they have facilities for repairing cars which they sell, OPA intended to work closely with the State Department. The dealers were also informed that State Officials had contacted us and agreed to furnish us with information on all dealers operating in Rhode Island. In general, it was stated that any dealer who could qualify for a State license should
53 be able to qualify for OPA approval as a 'dealer.' Mr. Motta asked Mr. Crook, as President of the New Car Dealers' Association, and Mr. Cesare, as Secretary of the Used Car Dealers' Association, to prepare and circulate letters advising their members relative to the provisions of Section 15 (b). Both parties agreed to send out letters.

A full explanation of Section 15 (b) was given. It was clearly stated that only those dealers who maintain their own facilities for repairing and reconditioning used cars need not make formal application to OPA; and that dealers who have working arrangements with repairmen must make formal application.

The suggestion was made that Mr. Crook write to Mr. Del Sesto, requesting that he accept their proposal to the effect that a subcommittee to handle the used-car regulation be set up within the Advisory Committee at once, and that the subcommittee be in power to act instead of the full committee. The procedure for filing Certificates of Transfer was reviewed. Similarly, other provisions of the regulation pertaining to additions for
54 extra equipment and the dealer warranty section, were discussed."

Mr. VOTOLATO. The plaintiff rests, if Your Honor please.

Opening by Mr. Goldberg.

55 TESTIMONY FOR THE DEFENSE LOUIS E. BAKER (Sworn)

By Mr. GOLDBERG:

1. Q. Mr. Baker, are you in the automobile business?

A. Yes; I am.

2. Q. And you are a member of the Used Car Dealers' Association?

A. Yes; the Rhode Island Used Car Dealers' Association. I am the president.

3. Q. You are an active dealer?

A. Yes.

4. Q. On or about August 2, 1944, did you along with Mr. Richard Cesare and Mr. Frank Crook have a conference at the Office of Price Administration?

A. Yes.

5. Q. And you heard the report of that conference read here today?

A. Yes.

6. Q. Read by Mr. Motta?

A. Yes.

7. Q. Now, at that conference did Mr. Motta or anyone else inform you as a representative of the Used Car Dealers' Association that those that qualified under the State law would have a blanket qualification under this law?

56 Mr. VOTOLATO. I object. He is attempting to contradict Mr. Motta.

The COURT. This is his case. Mr. Motta was your witness. He is attempting to contradict what Mr. Motta said.

A. That is the way we interpreted it then, that anybody that is a dealer under the State, they would work together with the State and they would be qualified to sell the car at guaranteed prices.

Mr. VOTOLATO. I move that be stricken out, Your Honor.

The COURT. Not responsive. It may be stricken.

8. Q. As a result of the conference did you notify the used car dealers as to their status?

A. Yes; we did.

9. Q. And did you notify them that those who had qualified under the State law were qualified under the provisions of these regulations?

Mr. VOTOLATO. I object.

The COURT. If he did, would that get away from the rules and regulations? Has anybody got a right to set aside these

57 rules and regulations? The question is, what are the rules and regulations? This witness testified that he interpreted the rules and regulations from what Mr. Motta said to be one thing. The question is, are these the rules and regulations? Has this defendant complied with these rules and regulations, not with what somebody says he can do? The rules are here. The report has been read. The question is, did this man comply with the rules and regulations, not what this witness thought the rules were, and not what he thought Mr. Motta said? I think I could go further and say that if Mr. Motta said something contrary to the rules it would not make any difference. Objection sustained, and your exception is noted. Defendant's exception noted.

Mr. VOTOLATO. I would like to recall Mr. Schwartz.

Mr. GOLDBERG. No objection.

58 MAX SCHWARTZ (Recalled)

By Mr. VOTOLATO:

31. Q. Are you familiar with the provisions of the enforcement of this act, or the regulations?

A. The evasion section; yes.

32. Q. Do you know what the act provides for in case of a violation of the act?

A. Well, he is subject to a penalty provided by Congress. He can be liable for up to three times the amount of any overcharge.

33. Q. Is there a counsel fee in addition?

A. I believe there is. I am not too familiar with that. I think in order to justify a finding of more than once the overcharge it must be shown that it was wilful.

34. Q. Will you read Section 13?

A. "Persons violating any provisions of this regulation are subject to the criminal penalties, civil enforcement actions, proceedings for suspension of licenses, and suits for treble damages provided for by the Emergency Price Control Act of 1942, as amended."

35. Q. Do you have the Emergency Price Control Act with you?

A. No, I haven't.

36. Q. The wilful part was amended in 1945; isn't that correct?

59 A. I believe it was.

37. Q. Do you know the date? Was it July?

A. It was amended each time since 1942 on July first. I think the act expires each year on June thirtieth. Since the original date it has been amended. The last amendment was in June 1944.

38. Q. That had to do with wilful violations?

A. Yes.

39. Q. Before that time the wilful part did not enter into it?

A. No.

Recess.

60 RICHARD E. CESARE (Sworn)

By Mr. GOLDBERG:

1. Q. What is your occupation or business?

A. Automobile dealer.

2. Q. New or used cars?

A. Used cars.

3. Q. Where is your business?

A. The West Motor Company, 10 Winter Street, Providence.

4. Q. Are you a member of the Used Car Dealers' Association, Mr. Cesare?

A. Yes.

5. Q. Are you an official there?

A. Yes; secretary and treasurer.

6. Q. As such secretary and treasurer, along with the president, Mr. Baker, you attended a conference at which Mr. Arris and Mr. Motta and Mr. Schwartz were present?

A. I think that conference you have in mind is the one; yes.

7. Q. At that time did you get any information which you passed on to your members?

A. I did.

8. Q. What was the nature of the information that you got and passed on to your members?

Mr. VOTOLATO. I object; hearsay.

The COURT. What do you say on that?

61 Mr. GOLDBERG. The parties present were there and they were here for cross-examination. I don't believe it falls within the hearsay rule.

Mr. VOTOLATO. Unless the plaintiff was present it is hearsay testimony.

The COURT. I think that is so. Where the court's attention is called to the rule—I think counsel often put in hearsay testimony and let it go in, and there the court is not called upon to take action. Occasionally there is objection, and the court must invoke the rule. If he learned something in the absence of the plaintiff and passed it on to the defendant, wouldn't that be hearsay?

Mr. GOLDBERG. He attended the conference and in his capacity as secretary and treasurer he passed out the information.

The COURT. All right. Supposing he said that he attended a conference and these gentlemen were there, and that he learned this, that if you have a State license you can go ahead and you don't need an OPA license to become a person authorized to sell warranted used cars. Isn't that hearsay?

Mr. GOLDBERG. As I understand the hearsay rule the ques-
62 tion is direct statements. What he did as a result of the conference——

The COURT. Well, I don't know.

Mr. GOLDBERG. I will reframe the question, your Honor.

9. Q. As the result of the conference at the Office of Price Administration, at which conference Mr. Motta, Mr. Schwartz, and yourself and the president of your association were present, in your capacity as secretary and treasurer of the Used Car Dealers' Association what did you do?

A. I personally informed Mr. Harry Katt that he did not require a written approval from the Office of Price Administration in order to sell used cars at the warranted price because he had a State license.

Mr. Votolato. I move that be stricken out.

The Court. It may be stricken out and the jury will disregard it. It falls within the hearsay rule. Stricken out.

10. Q. Were you qualified at the State Board as a dealer?

A. I don't understand the question.

11. Q. Were you qualified in the State House as a dealer?

A. Yes.

12. Q. And you attended that conference?

63 A. Yes: I did.

13. Q. Did you obtain a license from the OPA——

A. No.

Mr. Votolato. I object to what he did.

The Court. Don't answer the question.

Go ahead.

14. Q. In your capacity as a dealer did you after that conference obtain a license or authorization from the Office of Price Administration?

Mr. Votolato. I object.

The Court. It seems to me what he did is not material upon this issue. The only issue is whether or not this man violated the provisions of the OPA regulations, and not whether somebody else violated them. Objection sustained. The previous answer may be stricken out. Your exception is noted. Defendant's exception noted.

Mr. Goldberg. The defendant rests, Your Honor.

Mr. Votolato. I would like to make a motion.

64 Mr. Goldberg. I would like to make a motion to direct a verdict for the defendant.

The Court. Take the jury out.

(Jury excused.)

Mr. Votolato. May it please the court, at this time I wish to move for the plaintiff that the court direct a verdict in his favor for treble damages, or three times the amount of the overcharge, plus a reasonable attorney's fee and costs, as provided by the act.

(Further argument by Mr. Votolato:)

The Court. The court cannot say that it was a willful and deliberate violation of the law. The court believes the plaintiff is entitled to counsel fees. The court does not believe $150 is too high.

Mr. Goldberg. May it please the court, during the trial any of the parties, and especially the defendant, may question the jurisdiction of the court. In this case we are trying a cause of

65 action arising out of an alleged violation of a rule or regulation of the OPA. That is a violation of a Federal act or a regulation under a Federal act.

Mr. VOTOLATO. I am going to interrupt, may it please the court. That was all taken up on a hearing on a demurrer before Mr. Justice O'Connell.

The COURT. I believe the court has jurisdiction. As a matter of law, the court believes this is properly before the court for determination.

Mr. GOLDBERG. The addition of an attorney's fee is a penalty and I don't believe that can be done here in this court.

The COURT. Bring in the jury.

(Jury returns to court.)

66 *Instructions to jury*

The COURT. Mr. Foreman and Ladies and Gentlemen of the jury: At the close of the testimony in this case the plaintiff's counsel moved that the court direct a verdict in his favor. That is Mr. Votolato. Mr. Goldberg moved that the court direct a verdict in favor of the defendant. In other words, you have a situation where the plaintiff believes there is no question of fact to go to the jury and the defendant says there is no question of fact to go to the jury. And that rather leaves the court in a fairly comfortable position, because quite often there is a serious question whether or not there is a question of fact. Here the plaintiff says there is none and the defendant says there is none. They both say to the court that it becomes a question of law for the court to pass upon. The jury only finds and passes upon questions of fact. With the findings of fact, counsel nor the court has any control over the jury. On the questions of law, equally that is for the court. The jury nor counsel have no jurisdiction over that.

67 The plaintiff in this case is bringing suit for an overcharge upon an automobile, a used car which he sold when he had not complied with the rules and regulations of the OPA concerning what a used-car dealer should do. He did not receive his license or authorization to act as a used-car dealer to sell warranted cars, cars sold with a warranty, until September 15, 1944, when this car was sold on August third. The defendant contends that he did not have to have any license, that he simply had a letter giving him permission because he had a State license. The law clearly provides that he should have had a license from the Office of Price Administration to sell used cars with a warranty. There has been a difference in the price charged of $210, but the court feels that the damages should not be treble, but single. If the court found that the act of the defendant was wilful, then the court could find treble damages. The court feels in this case there was not an intentional act, a wilful violation of the law, but rather it was more of a misunderstanding on the part of the de-

fendant, and the court feels the damages should be assessed at $210.
The law provides that a reasonable attorney's fee be added
68 to those costs. The court believes that $150 is a fair attorney's fee. That is not just for the trial of this case. This case has gone to the Supreme Court on a hearing on a demurrer. It was heard before another justice of this court who overruled the demurrer to the declaration filed by the plaintiff, and the party took the case to the Supreme Court, and the Supreme Court stated, as I understand it, it was prematurely brought up, and the case is now before us for consideration. In fixing the fee of $150, the court is taking into consideration the preparation of the case, the preparation of the writ and the filing of the declaration, the hearing before Mr. Justice O'Connell, the appearance in the Supreme Court, the disallowance of the bill and the hearing in this court. I think the charge of $150 is very reasonable and proper, and a fair charge.

Plaintiff's motion for directed verdict granted

The court grants the plaintiff's motion for a direction of a verdict. Counsel for the defendant has asked the court to direct a verdict in his favor because the court has no jurisdiction, it being
a Federal regulation and this case belongs to the United
69 States Court and this court has no jurisdiction to add an attorney's fee. The court denies the defendant's motion and notes the defendant's exception. Defendant's exception noted.
The COURT. Verdict for the plaintiff for $360 and costs. Defendant's exception noted. Defendant's exception noted.

70 *Reporter's certificate*

I hereby certify that the foregoing is a true copy of the proceedings in the foregoing case, according to my shorthand notes.

(S) CATHERINE FITZGERALD,
Stenographer Superior Court.

Approved and allowed:

(S) SULLIVAN, J.,
Associate Justice Superior Court.

8/18/45.

71 In Superior Court for County of Providence

Verdict

May 31, 1945

[Title omitted.]

By direction of the Court the jury find that the Defendant is guilty in manner and form as the Plaintiff has in his declaration

thereof complained against him and assess damages for the Plaintiff in the sum of $360.00/xx and costs.

HARRY M. YATES, *Foreman.*

72 (File endorsement omitted.)

73 In Superior Court for County of Providence

[Title omitted.]

Motion of Chester Bowles, Administrator, Office of Price Administration, for leave to intervene

Respectfully represents Chester Bowles as he is Administrator of the Office of Price Administration, as follows:

(1) That Section 205 (d) of the Emergency Price Control Act of 1942 (Pub. Law No. 421, 77th Congress, 2nd Session, 56 Stat. 23), as amended, hereinafter called the Act, provides in part as follows,

"In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the Court having jurisdiction of such suit or action shall certify such fact to the Administrator, The Administrator may intervene in any such suit or action."

(2) That as appears from the plaintiff's declaration herein, said plaintiff relies for ground for relief upon the Act, or upon a regulation, order, price schedule, requirement, or agreement thereunder.

(3) That as appears from the pleadings of the defendant herein and the transcript of the evidence and arguments at the trial hereof, said defendant has attacked the validity of the Act or regulation, order, price schedule, or requirement thereunder and has attacked the jurisdiction of this Honorable Court of the cause of action herein arising under Section 205 (e) of said Act.

Wherefore, said Chester Bowles, as Administrator, moves that he may be allowed to intervene as a party for the purpose

74 of safeguarding the interests of the public.

By his Attorney,

Ambrose W. Carroll,
AMBROSE W. CARROLL,
District Enforcement Attorney,
Office of Price Administration,
Rhode Island District Office.

Place on calendar for hearing Aug. 3, 1945.

CURRY, *J.*

NOTICE OF MOTION

To Arthur N. Votolato,
Attorney for Plaintiff,
542 Hospital Trust Building,
Providence, Rhode Island.

To Philip B. Goldberg,
Attorney for Defendant,
36 Exchange Place, Providence, Rhode Island.

Please take notice that Chester Bowles, Administrator, Office of Price Administration, has this 31st day of July 1945 moved in writing as above. Said motion will be called for hearing before said Court at its session in chambers to be holden at the County Courthouse in Providence on the 3rd day of August 1945 at 10 o'clock A. M.

Ambrose W. Carroll.

AFFIDAVIT

I, Ambrose W. Carroll, of Providence, Rhode Island, make affidavit and say that on the 31st day of July 1945 at 10:00 o'clock A. M. I served notice of the pendency of the within motion and of hearing thereon by leaving a notice of which the within is a true copy at the office of Arthur N. Votolato, the attorney of record of said plaintiff, with some person having charge thereof, and
75 at the office of Philip B. Goldberg, the attorney of record of said defendant, with some person having charge thereof.

Ambrose W. Carroll.

Subscribed and sworn to at Providence, in the County of Providence, this 31st day of July 1945,
Before me

J. Raymond Dubee,
Notary Public.

76 In Superior Court for County of Providence

[Title omitted.]

Order making Chester Bowles, Administrator, Office of Price Administration, party intervenor

Aug. 3, 1945

The above-entitled cause came on to be heard on the motion of Chester Bowles, Administrator, Office of Price Administration, for leave to intervene as a party for the purpose of safeguarding

the interests of the public, and was argued by counsel and thereupon upon consideration thereof, it is hereby ordered:

That Chester Bowles, Administrator, Office of Price Administration, be and he hereby is made a party intervenor.

Enter:

CURRY, *J.*

AUG. 3, 1945.

Entered as order of Court this 3d day of Aug. A. D. 1945.

By order

JOSEPH T. CURRAN, *Asst. Clerk.*

77 In Superior Court for County of Providence

Exception and notice

Filed August 9, 1945

[Title omitted.]

And now, after decision and order allowing Chester Bowles, Administrator, Office of Price Administration, to intervene as party intervenor in the above-entitled case, and within seven days after notice of such decision and order the defendant comes into Court and hereby excepts to said decision and order and hereby give notice of his intention to prosecute a bill of exceptions to the Supreme Court therein upon all of his exceptions in said case and move the Court to fix the time within which he shall file bill of exceptions, transcript of evidence, etc.

By his Attorney,

GOLDBERG & GOLDBERG,

Bill of exceptions and transcript of evidence, etc., to be filed in office of the clerk on or before August 30, 1945.

Providence, August 9, 1945.

CURRAN,
Justice of Superior Court.

Aug. 13, 1945, above time for filing extended.

Request is hereby made of the Court Stenographer by the defendant in the above-entitled cause for a transcript of the entire evidence, rulings, instructions, etc.

By GOLDBERG & GOLDBERG,
Attorneys for Harry Katt, Defendant.

Estimated cost of above transcript of evidence, etc., $10.00 deposited.

MATTHEW M. MCCORMICK, *Clerk.*

78 [File endorsement omitted.]

79 In Superior Court for County of Providence

[Title omitted.]

Defendant's bill of exceptions

Now comes the defendant in the above-entitled cause, and files this, his Bill of Exceptions, and says:

That this is an action of the case brought in the District Court of the Sixth Judicial District of the State of Rhode Island by the plaintiff, Alfred Testa, of the City and County of Providence, in the State of Rhode Island, against Harry Katt, of said City, County, and State, to recover damages arising out of the alleged violation by the said defendant of a Maximum Price Regulation issued by the Office of Price Administration under the Emergency Price Control Act of 1942, so-called, as amended, viz: (U. S. C. A. Act, Jan. 30, 1943, C. 26, 56 Stat. 23) (50 U. S. C. A. Appendix), which Emergency Price Control Act of 1942, so-called, provides for treble damages plus a reasonable attorneys' fee and costs in the event such violation should be proven.

To the declaration filed in said cause, the defendant filed a demurrer, and after hearing thereon, in said District Court the demurrer was overruled, and decision was entered for the plaintiff in the sum of Six Hundred Eighty ([illegible]) Dollars and costs, from which decision the defendant appealed to the Superior Court for the County of Providence.

80 That on the 17th day of January A. D. 1945, the Honorable Jeremiah E. O'Connell, Presiding Justice of the Superior Court, heard arguments upon said Demurrer to said Declaration; and, upon consideration thereof, rendered his decision overruling said Demurrer of the Defendant to the Declaration of the Plaintiff, to which the defendant fully excepted, and within seven (7) days after said decision, the defendant filed his exception to said decision of Mr. Presiding Justice O'Connell and gave notice of his intention to prosecute to the Supreme Court of the State of Rhode Island a Bill of Exceptions to said Decision; and within the time fixed by this Honorable Court for the filing of his Exceptions and Transcript of the arguments of counsel and the Decision of said Mr. Justice O'Connell, the defendant came into court and tendered his Bill of Exceptions and said that the exception upon which he relied was as follows:

That the decision of Mr. Presiding Justice O'Connell overruling the defendant's Demurrer to the plaintiff's Declaration is erroneous in law.

And the defendant further represents that the above matter was filed in the Office of the Clerk of the Honorable Supreme Court of

the State of Rhode Island; that on the 20th day of March A. D. 1945, the plaintiff filed a motion in the Honorable Supreme Court of the State of Rhode Island to dismiss the defendant's Bill of Exceptions as it was prematurely taken; and after hearing thereon, and after argument of counsel, the Honorable Supreme Court found that the defendant's Bill of Exceptions was prematurely taken, granted said motion and remitted the above case to his Honorable Superior Court for further hearing on the merits.

And the defendant further represents that on the 31st day of May A. D. 1945, a hearing on the merits was held before this Honorable Court with a trial by jury, Mr. Justice Mortimer A. Sullivan presiding. After the presentation of the cause
81 before the jury, both the plaintiff and the defendant filed motions for directed verdicts; and after hearing thereon, and upon consideration thereof, Mr. Justice Sullivan directed a verdict for the plaintiff for the sum of $360.00 and denied the defendant's motion for a directed verdict, to which the defendant fully excepted; and within seven (7) days after said decision, the defendant filed his exception to said directing of a verdict for the plaintiff by Mr. Justice Sullivan and gave notice of his intention to prosecute to the Supreme Court of the State of Rhode Island a Bill of Exceptions to said directing of the verdict.

Now, within the time fixed by Mr. Justice Sullivan of this Honorable Superior Court within which to file a Bill of Exceptions and a transcript of the evidence, the arguments of counsel and the decision of said Mr. Justice Sullivan directing a verdict for the plaintiff and denying a direction of the verdict for the defendant, the defendant comes to Court and tenders this, his Bill of Exceptions and says that the exceptions upon which he herein relies is as follows:

That the directing of the verdict for the plaintiff by Mr. Justice Sullivan is erroneous in law.

The defendant insists that said decision, being erroneous in law, is prejudicial against the defendant, and said error entitles the defendant to have said decision reversed. Wherefore, within the time prescribed by law, the defendant tenders this, his Bill of Exceptions, and a Transcript of the evidence and arguments of counsel and the decision of the said Mr. Justice Sullivan, and prays that same may be allowed by the Court according to law.

By his attorneys.

GOLDBERG & GOLDBERG.

Allowed:

SULLIVAN, J., *Justice.*

SEPT. 18 A. D. 1945.

84 In Supreme Court of Rhode Island

Ex. & c. No. 8741

ALFRED TESTA

v.

HARRY KATT

Opinion

May 23, 1946

CAPOTOSTO, J. This is an action on the case to recover damages for an alleged overcharge in the sale of an automobile in violation of the Federal Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944, 50 U. S. C. A. App. § 925 (e), hereinafter for convenience called the act. The defendant demurred to the declaration on several grounds, the principal one being that the portion of the act on which the case is based is penal in its nature and therefore, under the established law of Rhode Island, not cognizable in the courts of this state. A motion duly made by Chester Bowles, Administrator of the Office of Price Administration, for leave to intervene as a party for the purpose of safeguarding the interests of the public was granted. Following the overruling of defendant's demurrer, the case went to trial on his plea of the general issue before a justice of the superior court sitting with a jury.

At the close of the evidence the defendant moved for a directed verdict on substantially the same grounds as those urged in his demurrer. This motion was denied. The plaintiff also moved for a directed verdict and this motion was granted. The case is before us on defendant's exceptions to the overruling of his
85 demurrer, to the denial of his motion for a directed verdict and to the granting of such a motion in favor of the plaintiff.

It appears from undisputed evidence that on August 3, 1944, the defendant sold to the plaintiff an automobile for $1,100 and received payment in full for that amount. The maximum legal price established by price regulation No. 540 under the act, as amended, was then $890. The overcharge to the plaintiff was therefore $210. The court awarded the plaintiff this amount plus a counsel fee.

So far as pertinent, the act reads as follows: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of

the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation."

86 The determinative question in this case is raised by defendant's demurrer, which question we state as follows: If, under the established law of Rhode Island, the act, as amended, is penal in its nature, must our courts take jurisdiction of cases for violations of the act? The defendant contends that the act is a penal stature in an international sense and therefore not cognizable under our law in the courts of this state. If it is such a stature, then the instant case is governed by our decision in Robinson v. Norato, 71 R. I. 256, where a similar question to the one now before us was fully considered and determined in a case under the act before amendment.

Upon full consideration of the pertinent provisions of the act, as amended, we are of the opinion that it still is a penal stature in an international sense under the established law of Rhode Island. Although the amendment has softened to some extent the degree of penalty in the original act and may purport to have given to the court a modicum of discretion, yet in substance and effect the act fundamentally remains a statute that makes it possible for an individual or for the federal administrator in his official capacity, under certain conditions, to recover an award that has no relation, as compensation, to the actual overcharge alleged as a violation. In our judgment such an award is penal and not compensatory, especially when one considers the fact that the administrator may bring an action in behalf of the federal government itself for a violation of the act.

Clauses (1), (2), and the proviso hereinbefore quoted are so closely interrelated that the indivisibility of the provisions thereof is obvious. The act as it now stands does not leave the court free to exercise its discretion under all circumstances in fixing

87 the amount of liability. The court is given authority in the act to treble the amount of the overcharge in certain circumstances, but such authority is substantially nullified by the

equally material provision that the court *must* award an amount "*not less than $25* nor more than $50" in any event, if the overcharge, even though trebled, is less than $25. [Italics ours.]

This mandate is again repeated in the proviso, which apparently seeks to soften the rigor of the act if a defendant can prove that the violation was committed under specified extenuating circumstances. Although the act there provides that in such a case the overcharge shall be the amount of the award, yet it further provides that the court must award $25 if that sum is greater than the overcharge. Thus a person who had violated the act by an overcharge of one cent must be required by the court to pay not less than $25, and could be ordered to pay as much as $50, plus attorney's fees and costs in any event. Moreover, even if that person had proved that such violation was without willfullness or negligence, he nevertheless must be required by the court to pay not less than $25, plus attorney's fees and costs. Such a requirement in our opinion not only deprives the court of discretion but also is penal in its nature and intent.

The fixing of the arbitrary sum of $25 as the minimum award that the court is permitted to make in any case regardless of the circumstances, if that sum is greater than the overcharge, may, as was argued in behalf of the administrator, enlist the help of consumers in discouraging violations of the act. However, such an argument has no pertinency when the controlling question at issue is whether the act, in its nature and intent, is a penal statute under our law.

88 For the reasons stated, we cannot construe the act in any other manner than as a penal statute in the international sense and the case is therefore governed by Robinson v. Norato, supra. We affirm that decision and hereby adopt its reasoning on all matters of law as the basis for our conclusion in the instant case, namely, that an action for a violation of that portion of the act under consideration here can not be maintained in the courts of Rhode Island under our established law. This conclusion makes it unnecessary to consider defendant's remaining exceptions.

The defendant's exception to the overruling of his demurrer is sustained, and the case is remitted to the superior court for further proceedings.

90 In Superior Court for County of Providence

[Title omitted.]

Stipulation for substitution

It is hereby stipulated and agreed by all the parties to the above-entitled action that an order may be entered therein whereby Paul

A. Porter as Administrator of the Office of Price Administration shall be substituted for Chester Bowles in his capacity as Administrator, as party intervenor in said action.

Dated this 12th day of July 1946.

ARTHUR A. VOTOLATO,
Attorney for Plaintiff.
GOLDBERG & GOLDBERG,
Attorney for Defendant.
JOHN SULLIVAN,
District Enforcement Attorney,
Office of Price Administration,
Rhode Island District Office.

91 In Superior Court for County of Providence

[Title omitted.]

Order of substitution

July 15, 1946

It is hereby ordered that in accordance with the written stipulation and agreement of all the parties to the above-entitled action, signed by their attorneys on July 12th, 1946, the name of Paul A. Porter as Administrator of the Office of Price Administration be and the same hereby is substituted for that of Chester Bowles as Administrator of the Office of Price Administration, as party intervenor in said action.

ARTHUR N. VOTOLATO,
Attorney for Plaintiff.
GOLDBERG & GOLDBERG,
Attorney for Defendant.
JOHN SULLIVAN,
District Enforcement Attorney,
Office of Price Administration,
Rhode Island District Office.

Enter:

CHURCHILL.

July 15, 1946.
Assented to as to form:
By order.

ALBERT A. SOREIRO, *Asst. Clerk.*

92 Superior Court for County of Providence

Law No. 109024

ALFRED TESTA

vs.

HARRY KATT, APPT.

Final judgment

Aug. 16, 1946

Plaintiff's motion for entry of judgment is granted and judgment is Ordered entered for defendant in accordance with the decision of the Supreme Court of Rhode Island entered in this case.

Entered as an order of this Honorable Court this 16th day of August 1946.

By order,

EUGENE F. BRODIE, *Asst. Clerk.*

Enter:

CURRY, *J.*

AUGUST 16, 1946.

93 In Superior Court for County of Providence

Docket entries

1945, Jan. 17, Assigned to Jan. 17 M. C. on demurrer, 1945, Jan. 17, O'Connell, P. J. Heard on demurrer to declaration & demurrer is overruled, Deft's exception is noted. Deft. is allowed 2 wks. to plead over. 1945, Jan. 18, Deft. files notice, exceptions, etc. & has to Feb. 20, to Feb. 28, 1945, Feb. 28, Bill of exception and transcript filed and same day allowed and case including all papers therein certified and transmitted to Clerk of Supreme Court. C. E. Casey, Asst. Clerk. Supreme Court. 1945, Feb. 28, Filed April 2, Plaintiff's motion to dismiss defendant's exception as premature granted, and case remitted to the Superior Court for further proceedings. Bertram S. Blaisdell, Clerk. Papers rec'd from Supreme Court, April 3, 1945. Matthew M. McCormick, Clerk of the Superior Court.

1945, April 5, Assign to May 2 J. T. 1945, May 2; Assigned to May 16 J. T. 1945, May 16, Assigned to May 31, J. T.—1945, May 31, Sullivan J. Case opens to jury and trial proceeds upon plaintiffs motion and by direction of the Court the jury returns a verdict for the plaintiff in the sum of $360.00 no costs.—June 7,

Deft files exception, notice, etc. and has to July 11 for bill, etc.—July 11 to July 25; 1945 July 25 Bill of Exception & transcript filed.—1945, Aug. 3, Curry, J. Order entered making Chester Bowles, Adm. O. P. A. party intervenor.—1945 Aug. 9 Deft. files exceptions notice, etc. and has to Aug. 20, for transcript and bill of exceptions.—1945, Aug. 22, Joslin J. Heard on defts. motion to dismiss, cont. to Sept. 18/45.—1945 Sept. 18, Sullivan J. Heard on Deft's motions to dismiss and denied.—1945 Sept. 18 Sullivan, J. Bill of exceptions and transcript allowed and case including all papers therein certified and transmitted to Clerk of Supreme Court. C. E. Casey Asst. Clerk. Supreme Court—1945, Sept. 18 filed—1946 Feb. 6 heard May 23 opinion filed defendants exception to overruling of his demurrer sustained, and case remitted to Superior Court for further proceedings. Bertram S. Blaisdell—Papers rec'd from Supreme Court June 4, 1946 Matthew M. McCormick, Clerk of the Superior Court.—1946 July 15 Churchill, J. Order entered substituting Paul A. Porter as Administrator of the Office of Price Administration in place of Chester Bowles.

[Clerk's certificate to foregoing paper omitted in printing.]

1946, Aug. 16 Curry J. Heard and judgment ordered entered for the defendant in accordance with the decision of the Supreme Court of Rhode Island in this case. Def's exceptions noted. Deft. files exceptions, notice etc. and has to Sept. 3 for the bill, etc.

U. S. GOVERNMENT PRINTING OFFICE: 1948

Supreme Court of the United States

No. 431 —, October Term, 1946

Order allowing certiorari

Filed October 28, 1946

The petition herein for a writ of certiorari to the Superior Court for Providence and Bristol Counties, State of Rhode Island, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

724992—46

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 22 1946
CHARLES ELMORE CROPLEY
CLERK

No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1946

ALFRED TESTA AND PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONERS

v.

HARRY KATT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS FOR PROVIDENCE AND BRISTOL COUNTIES